OCTOBER TERM, 1994

MICHAEL HARRIS, PETITIONER

v.

RADIO-ELECTRONICS OFFICERS UNION (RADIO OFFICERS UNION) AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COMEN
Deputy Associate General Counsel

JULIE B. BROIDO
JOHN EMAD ARBAB
Attorneys
National Labor Relations Board
Washington, D.C. 20570

1488

QUESTION PRESENTED

Whether the Union violated the National Labor Relations Act by removing petitioner from its job referral lists for nonpayment of dues.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Breininger v. *Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67 (1989)	7, 8
Local 357, Int'l Bhd. of Teamsters v. *NLRB*, 365 U.S. 667 (1961)	7
Morrison-Knudsen Co., 291 N.L.R.B. 250 (1988)	10
Neely v. *Martin K. Eby Construction Co.*, 386 U.S. 317 (1967)	9
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	8

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A)	4, 5, 8
§ 8(b)(2), 29 U.S.C. 158(b)(2)	4, 8

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1

MICHAEL HARRIS, PETITIONER

v.

RADIO-ELECTRONICS OFFICERS UNION (RADIO OFFICERS UNION) AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 16 F.3d 1280. The decision and order of the National Labor Relations Board (Pet. App. 15a-21a), including the decision of the administrative law judge (Pet. App. 21a-46a), is reported at 306 N.L.R.B. 43.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1994. Petitioner, who was not a party in the court of appeals, subsequently moved for leave to intervene and filed a petition for rehearing. On May 12, 1994, the court of appeals granted petitioner's motion to

intervene and denied the petition for rehearing. Pet. App. 47a-48a. On May 13, 1994, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 2, 1994. Pet. App. 49a. The petition for a writ of certiorari was filed on June 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Radio-Electronics Officers Union (Union) represents radio officers, radio electronics officers, and master radio electronics officers who work on vessels of the United States merchant fleet and other oceangoing freight vessels. Pursuant to collective bargaining agreements between the Union and various employers, the Union operates a hiring hall that serves as the exclusive source of job referrals for signatory employers. The Union operates the hiring hall under shipping rules that are incorporated into the collective bargaining agreements and the Union's bylaws. The shipping rules require individuals seeking referrals to make a written request for registration on a national shipping list, which establishes a ranking of eligible users of the hiring hall, and to make a separate request for placement on any of the Union's three on-hand lists, which establish the order of referral of jobs on the Atlantic, Gulf, and Pacific coasts. A user of the hiring hall must be on the national shipping list in order to be placed on the on-hand lists, from which all referrals are made. Pet. App. 16a-17a, 23a-24a.

Article 19, Section 1 of the shipping rules provides in relevant part:

> A member must be in good standing to be placed on the National Shipping List, and must remain so to continue his employment. Non-members must pay

> the current quarterly service fee to be placed on the National Shipping List and must continue to pay the quarterly service fee during the period of their employment.

Pet. App. 24a.

On March 15, 1988, petitioner, a long-time union member, wrote the Union to request placement on the Atlantic coast on-hand list, and the Union complied with that request. Petitioner failed to pay his quarterly union dues, however, which were due on or before April 1. By computer-generated action on April 1, the Union automatically removed petitioner's name from the national shipping list for nonpayment of dues. The Union sent petitioner a letter notifying him of that action and advising him to reregister after making payment. As a result, petitioner was rendered ineligible for referral from the hiring hall. Pet. App. 17a, 25a-26a. Although the Union did not notify petitioner of his delinquency before removing his name from the national shipping list, during the preceding year the Union had sent petitioner and all other union members monthly newsletters, several of which specifically reminded the recipient of a member's obligation under the shipping rules to remain current in union dues, and of the consequences of failing to do so. The newsletters, such as one sent in April 1987, warned (*id.* at 26a-27a):

> NINE MEMBERS WERE DROPPED FROM THE APRIL NATIONAL SHIPPING LIST FOR NON-PAYMENT OF DUES. MEMBERS ARE REQUIRED TO BE IN GOOD STANDING TO GET ON THE LIST. AND THEY ARE REQUIRED TO BE IN GOOD STANDING TO STAY ON THE LIST. THE COMPUTER IS MERCILESS, AND EVEN IF YOU ARE

> NUMBER 1 WHEN YOU GET BEHIND IN PAYMENT OF DUES, YOU WILL BE DROPPED FROM THE LIST IMMEDIATELY. THE BEST WAY TO AVOID THIS IS TO PAY BY THE YEAR.

In November 1988, the Union adopted a new bylaw requiring dues "to be received by the Union at least fifteen days prior to the end of each calendar quarter," and conditioning members' ability to register on the shipping lists on the Union's timely receipt of dues. Pet. App. 31a. The Union's practice under that bylaw was to send a written notice to delinquent dues payers at some point between 15 days before the beginning of the new quarter and its actual start advising them of a delinquency and warning them of the consequences of failing to make a timely payment. *Id.* at 31a-32a.

2. In June and December 1988, petitioner filed unfair labor practice charges alleging that the Union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (Act), 29 U.S.C. 158(b)(1)(A) and (2), by removing his name from the national shipping list and by maintaining the November 1988 bylaw. Pet. App. 21a-22a. After a hearing, the administrative law judge (ALJ) found that the Union unlawfully removed petitioner from the national shipping list for nonpayment of dues because it did not first notify him of his delinquency and afford him a reasonable opportunity to cure it. *Id.* at 30a-31a. The ALJ also concluded that the Union's November 1988 bylaw was unlawful as implemented, in that the Union failed to demonstrate that its notification system actually afforded delinquent dues payers 15 days' advance notice within which to cure their delinquencies. *Id.* at 33a. In so holding, the ALJ assumed that the relevant collective bargaining agreements contained a valid union security clause. *Id.* at 27a & n.6.

The Board affirmed the ALJ's conclusions, but on a different ground. Pet. App. 20a. The Board explained that the operator of an exclusive hiring hall owes users a duty of fair representation, which includes an obligation to operate the hall in a manner that is not "arbitrary or unfair." *Id.* at 19a. The Board noted that when a union prevents an employee from gaining employment through an exclusive hiring hall, "it demonstrates its power and influence over his livelihood so dramatically as to compel an inference that the effect of the union's action is to encourage union membership." *Ibid.* The Board observed that a union can overcome that inference by showing either that it acted pursuant to a valid union security clause or that its action was necessary to the performance of its representative function. *Ibid.*

The Board found that the Union could not justify its conduct by reference to a union security clause, because (contrary to the assumption made by the ALJ) there was no evidence that any collective bargaining agreement providing for the operation of the hiring hall contained a union security clause. The Board further found that the Union had not established that dropping petitioner from the national shipping list without first giving him specific notice of the dues he owed and a reasonable opportunity to remit payment was "necessary to the effective performance of its representative function." Pet. App. 19a. Having found that the Union breached its duty of fair representation, thereby violating Section 8(b)(1)(A), Pet. App. 20a, the Board ordered the Union to place petitioner's name on the next national shipping list and any of the on-hand lists on which he requested placement, and to make him whole for any lost wages and benefits he suffered as a result of the Union's action. *Id.* at 43a-44a.

3. The court of appeals declined to enforce the Board's order.[1] Pet. App. 14a. The court agreed with the Board that "[t]he presumption of illegality undoubtedly applies to the Union's delisting of [petitioner]." *Id.* at 10a. The court also agreed with the Board that, because its collective bargaining agreements did not contain a union security clause, "the only question * * * is whether the Union has rebutted the presumption by establishing a necessity defense." *Ibid.* The court, however, concluded that the Union had successfully made out that defense.

The court found that the Union applied its rule requiring deletion from the national shipping list of the names of all delinquent dues payers automatically and uniformly. Pet. App. 10a. The court also found it reasonable to infer that petitioner was aware of the Union's practice, given that the monthly newsletters confirmed that delisting was "the automatic effect of any delinquency," and that petitioner, "a seasoned mariner who depended on the hiring hall for his livelihood," was unlikely to have been "oblivious of the consequences of failing to pay his dues on time." *Ibid.* Finally, the court concluded that, since there was no evidence of a union security clause in the Union's collective bargaining agreements, and no dispute that the Union's hiring hall was open to nonmembers as well as members, the Union was not required to give petitioner explicit notice of his

---

[1] In addition to its finding respecting petitioner, the Board, in agreement with the ALJ, found that the Union had unlawfully refused to register another employee, Harry Dunleavy, on the national shipping list because he had not paid a Union fine. Pet. App. 16a n.2, 42a. The court of appeals affirmed that portion of the Board order. *Id.* at 14a. The Union does not seek review of that aspect of the decision below.

delinquency and an opportunity to take corrective action before removing him from the national shipping list. *Id.* at 11a.

ARGUMENT

The disagreement between the Board and the court of appeals turns on the question whether, in the circumstances of this case, it was necessary for the Union to give particularized notice to petitioner of the consequences of his nonpayment of dues before removing him from the hiring hall referral list. That issue does not merit this Court's review. Nor, contrary to petitioner's contention, does the case raise any other issue worthy of this Court's attention.

1. In *Local 357, Int'l Bhd. of Teamsters* v. *NLRB*, 365 U.S. 667, 674-677 (1961), this Court held that the use of a union hiring hall as the exclusive source of job referrals does not constitute discrimination within the meaning of the Act, provided that the hiring hall is open to both members and nonmembers and that there is no showing of discrimination against nonmembers. The operator of an exclusive hiring hall, however, owes a duty of fair representation to the users of the hall, and that duty includes an obligation to operate the hall in a manner that is not "arbitrary and discriminatory." *Breininger* v. *Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 88 (1989).

The Board found here that the Union acted arbitrarily and unfairly by removing petitioner from its referral registers and by applying its November 1988 bylaw in a way that denied him sufficient time to cure his dues delinquency before striking him from the registers. Pet. App. 19a. The court of appeals applied the same framework of analysis as the Board, see *id.* at 7a-8a, but held that, in the circumstances of this case, the Union

did not act arbitrarily by removing petitioner from the national shipping list before notifying him of and affording him an opportunity to cure the delinquency, because petitioner, a long-time union member, in fact knew of his obligation to remain current in payment of dues and had been repeatedly reminded by union publications that dues delinquency would result in automatic removal from the referral lists.

The Board believes that the court of appeals should have accepted its finding that the Union acted arbitrarily in failing to give petitioner specific notice of, and an opportunity to cure, his dues delinquency. The Board did not file its own petition for a writ of certiorari, however, because the issue dividing the Board and the court (that posed by Question V of the petition, see Pet. ii) essentially turns on the inferences to be drawn from the record in this case. The court of appeals' resolution of that issue does not warrant this Court's review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

There is no merit to petitioner's contention (Pet. 11) that the court of appeals "squarely rejected" the Board's interpretation of Section 8(b)(1)(A) and (2) of the Act as precluding "unfair, irrelevant, or invidious considerations in employee referrals of employees," and that this case therefore presents an issue left open in *Breininger*, 493 U.S. at 85 n.9. The court of appeals did not hold that a union may operate a hiring hall by the use of unfair, irrelevant, or invidious criteria. Rather, the court evaluated the same factors considered by the Board in determining whether a union has breached its duty of fair representation in the operation of a hiring hall, Pet. App. 10a, but reached a different conclusion in the

circumstances here.[2] Significantly, in the court of appeals, petitioner contended merely that the court "misapplied" *Universal Camera Corp.* in rejecting the Board's holding. Pet. for Reh'g at 3.

2. Petitioner contends (Pet. 13-15, 21-23) that the Union's hiring hall constituted a closed shop because he was required to maintain union membership in good standing in order to remain on the referral registers. As an initial matter, that claim was not raised in or addressed by the court of appeals. While petitioner did not intervene in the case until after the court of appeals issued its decision, petitioner did not present his claim of a "closed shop" in his petition for rehearing. In these circumstances, there is no basis for deviation from the "normal policy" of not considering issues initially presented to this Court. *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

In any event, petitioner's claim lacks merit. As noted above, *Local 357* holds that vesting the union with exclusive authority to refer applicants for employment does not constitute unlawful discrimination under the Act so long as the hiring hall is open to members and nonmembers and the union does not discriminate against nonmembers. The Board, upheld by the court of appeals, found, and petitioner concedes (Pet. 3), that the hiring hall was open to members and nonmembers alike. Petitioner, as well as any other member, had the option

---

[2] The court did find, in contrast to the Board, that, given the lack of a union security clause and the openness of the hiring hall to union nonmembers and members, "the rationale for a stringent notice standard [accepted by the Board] is absent here." Pet. App. 11a. But the court ultimately viewed the Union's newsletters and petitioner's longstanding membership as proxies for actual notice, as they supported the inference that petitioner was aware "of the consequences of failing to pay his dues on time." *Id.* at 10a.

of foreswearing union membership and using the hiring hall as a nonmember on the same basis as every other referent simply by paying the referral fee required of nonmembers.[3] Accordingly, there is no basis for concluding that use of the referral system here was limited to union members in good standing.

Nor is there any other basis in this record for concluding that the Union's hiring hall arrangement constituted either a "closed shop" that restricted employment opportunities to the union members in good standing, or a "union shop" that required job applicants to become and remain union members in good standing after employment. The Board, upheld by the court of appeals, found that, although the collective bargaining agreement provided that referrals for employment would be processed exclusively through the Union's hiring hall, the record failed to establish that the contract contained a union security provision that conditioned employment on union membership, or its subsequent attainment. That fact-specific finding does not warrant review here.[4]

---

[3] The shipping rules require that nonmembers pay the "current quarterly service fee" in order to use the hiring hall. Pet. App. 24a. The record does not disclose the amount of that fee. No contention was made in this case that the fee charged nonmembers exceeded the pro-rata expense of operating the hiring hall. Cf. *Morrison-Knudsen Co.*, 291 N.L.R.B. 250 (1988).

[4] The court of appeals did not rule, as petitioner claims (Pet. 22), that "no 'union-security' agreement exists unless it is an explicit part of a collective-bargaining agreement." The court, like the Board, simply noted that there was no evidence of a union security agreement. Pet. App. 11a, 18a. No party introduced any collective bargaining agreement into evidence or presented testimony on the subject. And, petitioner cites no language in the Union's shipping rules requiring individuals to join the Union as a

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JULIE B. BROIDO
JOHN EMAD ARBAB
Attorneys
National Labor Relations Board

AUGUST 1994

---

condition of obtaining or maintaining employment with employers covered by the agreement.